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Supreme Court of United States.

OCTOBER TERM, 1903.

WILLIAM A. PLATT, as Receiver of the Commercial National Bank of Denver, Colorado,
Plaintiff in Error,
vs.
OSEE W. WILMOT,
Defendant in Error.
No. 167.

In Error to the United States Circuit Court of Appeals for the Second Circuit.

STATEMENT.

This action was begun in the Northern District of the State of New York on the 15th day of September, 1897, for the purpose of recovering from the defendant the sum of $2,000, on account of what is commonly called his double liability as a stockholder in the Western Farm Mortgage Trust Company of Lawrence, Kansas, a corporation organized under the laws of the State of Kansas.

On the trial in the Circuit Court the judgment was for the defendant, the Court holding that plaintiff's cause of action was barred by the provisions of Section 394 of the Code of Civil Procedure of the State of New York. There-

upon the case was taken by plaintiff, on writ of error, to the Circuit Court of Appeals for the Second Circuit, where the judgment of the Circuit Court was affirmed, the Circuit Court of Appeals also holding that plaintiff's action was barred by the provisions of said Section 394.

The essential facts are as follows:

The said Western Farm Mortgage Trust Company was organized under the laws of the State of Kansas, *as a business corporation*, on the 28th day of November, 1887, with a capital stock of $1,500,000, divided into shares of the par value of $100.00 each and with its chief office and place of business at the City of Lawrence, Douglass county, Kansas. The Commercial National Bank of Denver, Colorado, on the 3rd day of June, 1893, recovered in the District Court of Douglass county, Kansas, a judgment against said Western Farm Mortgage Trust Company, in the sum of $4.930.72. On the 29th day of August, 1894, there was issued on said judgment an execution directed to the sheriff of said Douglass county, Kansas, commanding him to levy upon and sell the property of said Trust Company for the payment of said judgment, which said execution was, on said 29th day of August, 1894, delivered to said sheriff, and on the 7th day of September, 1894, said sheriff returned the same *nulla bona*, the said Trust Company being wholly insolvent and having no property whereon said execution could be levied.

Subsequent to the date of the rendition of said judgment against said Trust Company, and prior to the institution of this suit, plaintiff was appointed receiver of said Commercial National Bank by the comptroller of the currency, and by him authorized and directed to institute and prosecute this action.

Long prior to the rendition of said judgment of said

bank against said Trust Company, the defendant in error became the owner and record holder of capital stock of said Trust Company to the amount of $2,000.

Section 2, of Article XII, of the Constitution of Kansas, is as follows:

"Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder; and such other means as shall be provided by law; but such individual liabilities shall not apply to railroad corporations, nor corporations for religious or charitable purposes."

Section 32, Chapter 23, General Statutes of Kansas, is as follows:

"If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder except upon an order of the Court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such Court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

The only question that will be presented for the consideration of this Court, is whether or not plaintiff's action is barred by statute of limitation; and this question depends upon whether Section 382, or Section 394, of the Civil Code of New York, is applicable.

Section 382, which plaintiff in error insists is applicable, is as follows:

Within six years:

"1. An action upon a contract obligation or liability, express or implied; except a judgment or sealed instrument.

2. An action to recover upon a liability created by statute; except a penalty or forfeiture.

3. An action to recover damages for an injury to property, or a personal injury; except in a case where a different period is expressly prescribed in this chapter.

4. An action to recover a chattel.

5. An action to procure a judgment other than for a sum of money, on the ground of fraud, in a case which, on the thirty-first day of December, 1846, was cognizable by the court of chancery. The cause of action, in such a case, is not deemed to have accrued, until the discovery by the plaintiff, or the person under whom he claims, of the facts constituting the fraud.

6. An action to establish a will. Where the will has been lost, concealed, or destroyed, the cause of action is not deemed to have accrued, until the discovery, by the plaintiff, or the person under whom he claims, of the facts upon which its validity depends.

7. An action upon a judgment or decree, rendered in a Court not of record, except where a transcript shall be filed, pursuant to Section 3017, of this act, and, also, except a decree heretofore rendered in a surrogate's court of the state. The cause of action in such a case is deemed to have accrued when final judgment was rendered."

Section 394, which defendant in error contends is applicable, is as follows:

"This chapter does not affect an action against a director or stockholder of a moneyed corporation, or banking association, to recover a penalty or forfeiture imposed, or to enforce a liability created by the *common law* or *by statute;* but such an action must be brought within three years after the cause of action has accrued."

Said section 394 was originally enacted to cover certain liabilities which the Statute of that state imposed upon stockholders and directors of corporations, on account of certain acts of malfeasance and misfeasance; and the

history of said section clearly shows that it was never intended to apply to any other than New York corporations.

The Western Farm Mortgage Trust Company was not a railroad, religious or charitable corporation, nor was it a banking or insurance corporation, but was organized under the laws of Kansas, *as a business corporation.*

In its Articles of Incorporation the purposes for which it was organized are set forth as follows:

"Article II. The purposes for which it is formed are to receive deposits of money, bonds and securities; *to loan money on real estate and personal security; to negotiate loans on real estate and other securities;* to purchase and sell bonds and notes secured by mortgages and deeds of trust on real estate; to purchase and sell municipal bonds and the bonds, assets and franchises and securities of other corporations; to issue and sell its debentures and secure the same by pledge of notes, bonds and other securities, real or personal; to guarantee the payment of principal and interest of loans by it negotiated or made and sold; to act as financial agent of any state, municipality, corporation, association, company or person; to purchase, hold, sell and convey such real estate and personal property as it may require for its use; to purchase, hold, sell and convey such real estate and personal property as may be necessary for the security or collection of claims due or owing it; to accept and execute any trust committed to it by any municipality, corporation, association, company, person or other authority."

This case was decided by the Circuit Court, Judge Cox presiding, on the authority of the case of *Hobbs vs. Bank,* C. C. A. Rep. That case was decided by the Circuit Court, the same Judge presiding, in favor of the plaintiff, but on appeal the Circuit Court of Appeals of the Second Circuit reversed the judgment, two of the judges holding that the action was barred by the three-year limitation, and the other holding that the six year limitation applied.

SPECIFICATION OF ERRORS.

Plaintiff in error says that the Circuit Court of the Northern District of New York committed error in holding that plaintiff's action was barred by the provisions of Section 394 of the Civil Code of the State of New York; and also committed error in rendering judgment in favor of defendant.

And he also says that the Circuit Court of Appeals of the Second Circuit committed error in holding that plaintiff's action was barred by the provisions of said Section 394; and also committed error in affirming the judgment of the said Circuit Court.

BRIEF.

I.

An examination of the origin and history, and of the phraseology of the enactment will clearly demonstrate that the provisions of Section 394 of the New York Code apply only to actions against directors and stockholders of corporations and associations organized under the laws of that state, and hence are not applicable to this action.

Section 394 of the New York Code is an exception to the General Statutes of Limitations—taking out, as it were, some of the cases governed thereby. Under the familiar rules of construction the exception is to be construed as applicable only to those cases clearly and plainly covered by it. By the express terms of this section it is limited in its operation to actions against directors and stockholders in "*moneyed corporations*" and "*banking associations.*"

These terms are both peculiar to the legislation of the State of New York. They are unknown to the common law. They are not used by the text writers nor found in the statutes of other states, but they have been, for many years, in constant use in the State of New York, *and always with reference to New York corporations.*

The second title of Chapter 18, of the Revised Statutes of New York, enacted in 1827, is entitled "*of moneyed corporations,*" and that was the legislative origin of this term.

Article I, of this title, prescribes rules for the regulation of "*moneyed corporations,*" and the management of their affairs, and imposes penalties and *like* liabilities on the

directors and stockholders for the violation of these rules. It prohibits the making of dividends, except from the surplus profits, the withdrawal of any part of the capital without the consent of the legislature, the taking of notes in payment of any part of the capital stock, the making of excessive loans, loans to directors, etc. It provides for the manner of ascertaining the surplus profits from which dividends may be made, and for charging off losses. It prescribes when and how loans shall be called in, and provides for the disposition of hypothecated stock. It imposes penalties on the directors for violations of these regulations, and provides that, in certain cases, when judgment against the directors for such penalties cannot be collected, the stockholders shall be liable therefor.

Article II provides for the election of directors of "*moneyed corporations.*" It directs the manner of conducting such elections, and it imposes penalties on the director for failure to comply with these requirements.

Article III contains definitions of certain terms used in this title, among them the term "*moneyed corporations,*" which is defined to mean "every corporation having banking powers, or power to loan money on pledges or deposits, or authorized by law to make insurances."

From the very nature of these provisions, they must be held to apply *only* to New York corporations. They are absolutely inconsistent with any other idea. The legislature of New York could not have thus regulated foreign corporations, and it would not have attempted to do so.

The same legislature which enacted these provisions of the corporation law, also enacted a law concerning *the limitations of actions.*

Article IV., Chapter 4, Part 3, of the Revised Statutes, in which this same term is used.

Section 44, of said article, reads as follows:

"None of the provisions of this chapter shall apply to suit against directors or stockholders of any moneyed corporations, to recover any penalty or forfeiture imposed, or to enforce any liability created by the second title of the eighteenth chapter of the first part of the Revised Statutes; but all such suits shall be brought within six years after the discovery, by the aggrieved party, of the facts upon which such penalty or forfeiture attached, or by which such liability was created."

This was the origin of said section 394 of the present limitation law of New York. *The contemporaneous origin and use of the term "moneyed corporations" in these two enactments, the corporation law and the limitation law, shows that it was used with the same meaning in both; and must therefore be held to apply, as used in the limitation law, to New York corporations only.*

Mr. Sutherland, in his work on Statutory Construction, section 255, states the rule thus:

"A word repeatedly used in a statute will bear the same meaning throughout, unless a different intention appear."

So, if the *same* term, especially a new term, be used in different enactments by the *same* legislature, it will be presumed to have been used with the *same* meaning in both, unless a different intention clearly appear.

Moreover, the meaning of this term, as used in said section 44, is removed from the sphere of controversy, because by its express terms, said section is made applicable to suits to "*recover penalties imposed and enforce liabilities created by the second title of chapter eighteen of the first part of the Revised Statutes.*" It therefore follows necessarily that the term "*moneyed corporations,*" as used in said section, refers *only* to corporations organized under the laws of New York.

Said Section 44, as enacted in the Revised Statutes, remained unaltered until 1848, when it was amended by the substitution of the words *"the chapter of the Revised Statutes, entitled 'of corporations,'"* in place of the words, *"the second title of the eighteenth chapter of the first part of the Revised Statutes,"* and as thus amended, was enacted as Section 89 of Chapter 4, of the Laws of 1848, and reads as follows:

"None of the provisions of this chapter shall apply to suits against the directors or stockholders of a moneyed corporation, to recover any penalty or forfeiture imposed, or to enforce any liability created by the chapter of the Revised Statutes, entitled 'Of Corporations,' but all such suits shall be brought within six years after discovery by the aggrieved party, of the facts upon which such penalty or forfeiture attached, or by which such liability was created."

This amendment seems to have changed the phraseology without materially affecting the meaning of the section.

Again, in 1849, this section was amended by the substitution of the words, *"this title shall not affect actions,"* in lieu of the words, *"none of the provisions of this chapter shall apply to suits,"* by the insertion of the words, *"or banking association,"* after the words, *"moneyed corporation;"* and by the substitution of the words, *"by law,"* in place of the words, *"by the second title of the chapter of the Revised Statutes, entitled 'Of Corporation;'"* and, as thus amended, was enacted as section 109 of the Code, and reads as follows:

"This title shall not effect actions against directors or stockholders of a moneyed corporation or banking association, to recover a penalty or forfeiture imposed, to enforce a liability created by law; but such actions must be brought within six years after the discovery, by the aggrieved party, of the facts upon which the penalty or forfeiture attached, or the liability was created."

As thus amended in 1849, it remained unaltered until 1877, at which time the words, *"Three years after the cause of action has accrued,"* were substituted for the words, *"Six years after the discovery by the aggrieved party, of the facts upon which such penalty or forfeiture attached, or by which such liability was created."*

From the incipiency of this law in 1827 down to 1877, the policy of the legislation on this subject seems to have remained the same, except the shortening of the period of limitation to three years. The purpose of this was doubtless to encourage the people of the State of New York to invest their money in their home institutions.

However, a consideration of the amendment of 1877 is not important, so far as the question involved in the case at bar is concerned, as it only changed the period of limitation without in any way affecting the class of actions to which the law applied.

As amended by said act of 1877, said section was enacted as section 394 of the Code; and it is now contended that the language "created by law," incorporated into this section by the act of 1849, is broad enough to embrace actions against directors and stockholders of foreign corporations, as well as those of New York; but it must be borne in mind that this language *is controlled and limited* by the terms *"moneyed corporations,"* and *"banking associations,"* both of which refer exclusively to *New York corporations and associations.* Moreover, that such was not the intention of the legislature will clearly appear from a consideration of this amendment in connection with other legislation, prior and contemporaneous, which evidently created the necessity for the change in the law.

In 1838 a law providing for the formation of *"banking*

associations," was enacted (Chapter 260 of the laws of 1838).

This was the legislative origin of the term *"Banking associations."* These associations, in many respects pertaining to their organization and management, differed from ordinary corporations. The courts had decided that they were not subject to the provisions of the *second title of Chapter* 18 *of the first part of the Revised Statutes,* and their shareholders were, therefore, *not* subject to the liabilities imposed by said title (*Robinson vs. Bank,* 21 N. Y., 406); and besides it was expressly provided in said act authorizing the organization of these associations (Section 33, Chapter 260 of the Laws of 1838), that their shareholders should not be liable for the debts of the association, unless expressly so provided, in the Article of Association by them signed. But the legislature of 1849, the *same that made the above recited change in the limitation law,* enacted a statute (Chapter 226 of the Laws of 1849), *making the stockholders in all corporations, or joint stock companies, for banking purposes,* issuing bank notes for circulation as money, *liable for all debts and liabilities* that might be contracted after January 1, 1850. This act also prescribed certain regulations concerning such corporations and associations, and *imposed penalties* on any officer who should fail to comply with these regulations. This placed the officers and shareholders of *"banking associations" on a footing similar to directors and stockholders* in *"moneyed corporations";* and it naturally followed that the legislature should make the *same limitation law applicable to both.*

Again, the *same* legislature enacted another statute (Chapter 308 of the Laws of 1849), providing for the organization of insurance companies. This act *imposes penal-*

ties and liabilities on the directors and stockhholders of such companies, under certain conditions; and it was, therefore, reasonable and proper that the *same limitation law should apply to actions against them also.* This constituted another reason for the change of the phraseology of this section of the limitation law. The language of the section, as it had formerly stood, "*Penalties and forfeitures imposed and liabilities created by the second title of the chapter of the Revised Statutes, entitled 'Of Corporations,'*" would not have embraced actions against directors and stockholders in said insurance companies, nor actions against the officers and shareholders in "banking companies," because the penalties and liabilities were *not imposed* upon the stockholders in either, *by said chapter of the Revised Statutes.*

Therefore, the legislature, for the purpose of making this section of the limitation law embrace the new penalties and liabilities which it had created, changed the phraseology and substituted the words, "*by law,*" in lieu of the words, "*second title of the chapter of the Revised Statutes, entitled 'Of Corporations.'*"

Bostwick vs. Brinkerhoff, 99 N. Y., 185.

By no recognized rule of construction can there be attributed to the legislature an intention to make this section embrace actions against the directors and stockholders of foreign corporations.

"It is in the last degree improbable that the legislature would depart from the general system of the law, without expressing its intention *with irresistible clearness.*"

Endlich on Interpretation of Statutes, Section 113.
United States vs. Fisher, 2nd Cranch., 390.

According to the general system enacted more than twenty years prior to this amendment of 1849, this section,

excepting certain actions from the operation of the general limitation law of the state, had been applicable *only to actions against directors and stockholders in New York corporations;* and doubtless, *if the legislature had intended to effect a change so radical as to make it apply to foreign corporations, it would have done so in language so clear and unequivocal as to admit of no other construction.*

"It is an established rule of construction that general words and phrases, however wide and comprehensive in their literal sense, must be construed as strictly limited to the immediate objects of the act, and as not altering the general principle of the law; that is, they are to be construed as near the use and meaning of the prior law as may be, without violation of their obvious meaning."

Endlich on Interpretation of Statutes, Section 113.

The general term, "*created by law,*" used in said amendment of this section, must be construed as not altering the prior law so as to make it extend to foreign corporations, especially as the reason for the change of the phraseology can be found in the necessity for making the law *embrace new liabilities* that had been created by the *same* legislature which made the change.

"It is indispensable to a correct understanding of a statute, to inquire first what is the subject of it, and what object it is intended to accomplish."

Sutherland on Stat. Const., Section 218.

"The interpreter, in order to understand the subject matter and the scope and object of an enactment, must ascertain what was the mischief or defect for which the law had not provided, that is, he must call up all those historical facts which are necessary for this purpose and which led to the enactment."

Endlich on Interpretation of Statutes, Section 29.

Here the historical facts consist of legislative enactments, and they show that the defect to be remedied was the failure of this section, as it stood prior to this amendment, to cover actions to enforce liabilities which had just been imposed on the officers and stockholders of "banking associations," and insurance companies.

Another familiar rule of construction is that,

"Where words have been adopted by the legislature as having a certain definite meaning prior to a particular statute in which they are used, they must be construed in such statute according to the sense in which they have been theretofore used."

Sutherland on Stat. Const., Section 255.
The Abbottsford, 98 U. S., 440.
County Seat of Linn County, 15 Kansas, 379.

In the amendment of this section in 1849, the legislature retained the term "*moneyed corporations,*" which had been in use for more than twenty years as designating a certain class of corporations created by and organized under the laws of the State of New York; and, in the absence of clearly expressed intention to the contrary, it must be presumed that this term was used in this amendment with reference to this same class of New York corporations, and not with reference to corporation of other states, in the Statutes of which this term was not to be found.

"Every statute must be read in the light of the general laws on the subject in force at the time of its enactment."

U. S. vs. Freight Ass'n., 58 Fed. Rep., 58.

So, every particular expression or term must be considered in the light of its long continued use in prior legislation; and, thus construing the term, "*moneyed corporations,*" the conclusion is irresistible that it was intended to apply only to New York corporations.

Endlich on Interpretation of Statutes, Section 85, says:

"The rule which requires the construction of statutes with reference to their objects and subject matters, obviously also requires the language of the statute to be construed in the sense it bore at the period when the statute was enacted."

In 1849, when this amendment was enacted, the term "*moneyed corporations*" bore a well defined meaning—the designation of a certain class of New York corporations—and it must be confined to that meaning in this amendment.

It requires no argument to show that the term "*banking associations,*" used in this amendment of 1849, referred only to associations organized under the act of April 18th, 1838 (Chapter 260 of the Laws of 1838). In fact, we have a legislative declaration to that effect in section 10 of Chapter 189 of the Laws of 1857. This position will scarcely be controverted.

Probably every state in the Union has enacted a corporation law. Each one has subdivided and classified its corporations according to its own peculiar views, and has adopted such terms to designate these different classifications as its legislature deemed appropriate. The terms thus used become local, and acquire a local signification, and whenever found in the statutory law of a state which has thus adopted and localized them, they must be construed as referring to the corporations of that particular state, unless the language of the law is such as to clearly and unmistakably indicate a contrary intention.

The terms "*moneyed corporations*" and "*banking associations*" having been adopted by the legislature of the State of New York for the purpose of designating a certain class of *its* corporations, and *being peculiar to the legislation of that state*, and there being nothing whatever in the language of section 394, or in its history, or in the circum-

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Insert at page 17 of brief for plaintiff in error:

Our proposition is made still more sure by the revision of the New York Corporation Law, Chapter 563, Laws of 1890 (White on Corporations, 1902, p. 4).

Sec. 3, Sub. 4. "A moneyed corporation is a corporation formed under or subject to *the* banking or *the* insurance law."

Sec. 3, Sub. 11. "The term corporate law or laws when used in any law forming a part of the revision of the general laws of the State of which this chapter is a part, means the general laws of this State relating to corporations included in such revision."

It must be apparent that "*the* banking" and "*the* insurance laws" refers only to New York corporations. Again, Sub. 11 plainly restricts the same to New York corporations.

Again, the words "created by law," as used in this section, we believe to mean created by the law of New York, or stated another way, a liability created by the statute of another State, even though it be in the nature of a penalty or forfeiture would not be within the section.

If the meaning of the term "moneyed corporations" had been left for the Courts to define there would have been a greater chance for argument.

The Western Farm Mortgage Trust Company was not formed under or subject to the banking or insurance laws of New York. Add to this the fact that § 394 is an exception to an otherwise complete statute of limitations covering all kinds of contracts and liabilities, and that the term "moneyed corporation" is one peculiar to the statutes of New York, and that the Legislature has undertaken to define and limit its meaning and application to certain New York corporations, and the fact that the Statutes of Limitation are not favored by the Courts, and that this section being an exception and should be strictly construed, the conclusion is plain that § 394 does not apply to foreign corporations.

stances attending its enactment to show an intention on the part of the legislature to give these terms a different meaning, we respectfully insist that said section should be limited in its operation to actions against directors and stockholders of New York corporations.

In 1897 said Section 394 was amended by inserting the words "the common law or by Statute," in lieu of the word "law," but that amendment did not in any way alter or enlarge the class of persons to whom said section was applicable. It is still restricted in its application to directors and stockholders of *"moneyed corporations"* and *"banking associations."*

II.

If it be admitted for the sake of argument, that the provisions of Section 394 extend to actions against directors and stockholders of foreign corporations, of the class in said section designated, still said section does not apply to the case at bar, because the Western Farm Mortgage Trust Company is neither a "moneyed corporation" nor a "banking association."

If Kansas had adopted the same classification of its corporations that New York has, and employed the same terms to designate the various classes, then the Western Farm Mortgage Trust Company, if organized under either the law entitled *"of moneyed corporations,"* or that in regard to *"banking associations,"* would come within the provisions of Section 394, but *there is no such classification in Kansas,* and neither of these terms has ever been used to designate any corporation organized under the law of that state. The said company, in which defendant is a stock-

holder, is, therefore, not *eo nomine*, either a moneyed corporation or a banking association.

Now let us see if said company is the kind of corporation described by either of said terms.

It is *not a banking association*, because it is *not authorized, either by the law of its creation or by the terms of its articles of incorporation to carry on a banking business.* In fact, it could not, under the Constitution and Statutes of Kansas, in force at the time of its organization, be a banking association. Section I of Article XIII of the Constitution of that State, declares that, "*no bank shall be established otherwise than under a general banking law,*" thus prohibiting the organization of banking associations, except under a general law for that purpose, and there was no general banking law in Kansas prior to 1891 (Chapter 43, Laws of 1891). The Western Farm Mortgage Trust Company was organized in 1887 under the general corporation laws of Kansas—what is now Chapter 23 of the Revised Statutes of 1889 of that state. This was then the only statute providing for the organization of corporations of any character. It provides that corporations may be organized for certain specified purposes, *but banking is not one of the purposes specified.* It authorizes the formation of "loan and trust companies," but not of banks or banking associations. It also defines the powers of such corporations as may be created under its provisions but *invests no corporation with banking powers.* It will thus be seen that the Western Farm Mortgage Trust Company is not the kind of corporation described by the term "*banking association.*"

Is it embraced in the class described by the term "*moneyed corporations*"?

That term was defined at the time it was first brought

into use in the Revised Statutes of New York, to mean "*a corporation having banking powers, or power to loan money on pledges or deposits, or authorized by law to make insurance.*" An examination of the Articles of Incorporation of said company will show that it does not come within that definition. It was organized as a *loan company* and *not* as a bank. It did not possess banking powers, because no such powers were conferred on it, either by its articles of incorporation or by the provisions of the general corporation law under which it was created. Even if the articles of incorporation had provided that it should possess banking powers, such provision would be inoperative and of no effect, because unauthorized by the law of its creation. It did not have power "*to make loans on pledges or deposits,*" because, in the enumeration of the purposes for which it was organized, set forth in its Articles of Incorporation, *no such powers are mentioned*

Judge SHIPMAN, delivering the opinion of the majority of the Circuit Court of Appeals, in the Hobbs case, said:

"The Western Farm Mortgage Trust Company had power to make loans on pledges or deposits;" but the Court was evidently misled by a mis-quotation, in the brief of counsel for defendant in that case, because in their brief, discussing the powers of said company, they said it was empowered "to loan money on real estate and personal *property,*" while the actual language of the Charter is, "to loan money on real estate and personal *security.*"

By substituting the word "*property*" for the word "*security,*" they gave to this sentence an entirely different meaning. Authority to loan money on "*personal property*" is very different from authority to loan money on "*personal security.*" The words "*to loan on personal property*" might very properly be construed to include loans on "*pledges or deposits*" of personal property, but to loan on "*personal security*" means to loan on the personal under-

taking of one individual to be liable for the debt of another. This is the accepted meaning of the term throughout the entire country. If a banker tells me he will loan me a given sum of money on good personal security, I know that he does not mean on a pledge of jewelry or a deposit of a bond or note—he means the signing or endorsement of my paper by some solvent individual.

That part of the charter which reads, "to *negotiate* loans on real estate and other securities," means that the company had power to act as agent or broker between the borrower and lender of moneys secured by real estate or other securities. The power to *negotiate* loans is quite different from the power to *make* loans on real estate or other securities.

There is no pretense that said company was an insurance company or that it had power to make insurance. It is therefore not the kind of corporation described by the term "*moneyed corporations,*" as defined by the Revised Statutes, at the time of its origin.

This definition continued down to 1892 (Chapter 687, Laws of 1892), when the phraseology was changed, and this term was defined to mean "*a corporation formed under or subject to the banking or insurance law.*" This change of phraseology did not change the meaning of the law. It was not intended to effect a change.

This amendment was in the nature of a revision, and in such case it will be presumed that the legislature did not intend to change the law, unless the language employed is such as to clearly indicate such intention.

In the case of *Dominick vs. Michael*, 4 Sand., 374, the Court said:

"In the construction of a revised statute, a mere change in the language will not be regarded as evidence of an intention to vary the construction, unless the change is such as to render that intention manifest and certain."

To the same effect is the decision in the case of *Douglas vs. Douglas*, 5 Hun., 140, in which the Court used the following language:

"The rule on this subject is well established that 'where a law, antecedent to Revised Statutes, is settled, either by clear expressions of the statute or by adjudications on them, a mere change of phraseology shall not be deemed a change of the law, unless such phraseology evidently purport an intention of the legislature to work a change. *Sedgwick on Statutory Construction*, 428 and 429, and cases there cited)."

In the case of *Crosswell vs. Crane*, 7 Barb., 191, the Court, in discussing this question, said:

"It is well settled that in the revision of statutes, an alteration in the phraseology, or in the omission or addition of words, does not necessarily alter the construction of the act, or imply an intention on the part of the legislature to alter the law. In revision of the laws, reform of the language is not necessarily an alteration of the law. The intention of the legislature to alter the law must be evident, or the language of the new act must be such as palpably to require a different construction, before the courts will hold the law changed upon such revision merely from the fact of a change of the language employed."

See cases there cited.

In *Taylor vs. Delancey*, 2 Cain's Cases in Error, 143, 151, Judge SPENSER, delivering the opinion of the Court, said:

"These acts are of the description of revised laws, and if susceptible of doubt in their interpretation, resort must be had to the law existing antecedently * * * My opinion is founded on this proposition, that when the law antecedently was settled, either by clear expressions of the statutes, or adjudications on them, the mere change of phrase-

ology shall not be deemed or construed a change of the law, unless such phraseology purports an intention in the legislature to work a change."

The law, as it originally stood, defined a moneyed corporation by reference to the powers possessed by banking and insurance corporations. Some of the corporations had been formed under the general laws of New York authorizing their formation, while others had been created by special charter, but were subject to the provisions of the general laws of the state on that subject.

The law, as amended, defined moneyed corporations by reference to the laws under which they were created, or to which they were subject.

The two definitions amount to the same thing. They both point to the same class of corporations. A corporation having banking powers must have been formed under the general banking laws, or created by special charter which conferred on it such powers; and, if created by special charter, it would be subject to the general banking laws. Hence, it would be as well defined by the term "*formed under or subject to the general banking law*," as by the term "*having banking powers*."

The same is true of a corporation authorized to make insurances.

And, inasmuch as the change in the phraseology did not effect a change in the meaning of the law, and as the Western Farm Mortgage Trust Company is not one of that class of corporations described by the former definition of the term, it necessarily follows that it is not embraced in the latter definition. But, even if we construe the language of the latter definition literally, and without any reference to the former, it does not embrace the said company, because *it was not formed under, nor was it subject to a banking*

or an insurance law. It was not formed under, nor is it subject to, a banking law, because at the time of its formation, *there was no banking law in Kansas.* It was not formed under, nor was it subject to, the insurance law, because the subject of insurance is entirely foreign to the purposes set forth in its articles of incorporation. So we see that, whether we apply the *old* or the *new* definition of *"moneyed corporation,"* this company is not the kind of corporation described by that term.

THE INEVITABLE CONCLUSION IS THAT, INASMUCH AS NEITHER THE TERM "MONEYED CORPORATION" NOR THE TERM "BANKING ASSOCIATION" EO NOMINE, EMBRACES THE WESTERN FARM MORTGAGE TRUST COMPANY, AND AS THE NATURE OF SAID COMPANY IS NOT SUCH AS TO BRING IT WITHIN THE CLASS OF CORPORATIONS DESCRIBED BY EITHER OF THOSE TERMS, THIS ACTION IS NOT BARRED BY THE PROVISIONS OF SECTION 394, EVEN THOUGH IT SHOULD RE CONCEDED THAT SAID SECTION APPLIED TO FOREIGN AS WELL AS DOMESTIC CORPORATIONS.

III.

Even if we should concede that the provisions of Section 394 are applicable to foreign corporations, and that the Western Farm Mortgage Trust Company was a moneyed corporation, within the meaning of that term as used in said Section, still plaintiff's action would not be barred by said Section, because defendant's liability, which plaintiff is seeking to enforce, was created by contract, and therefore is governed by Section 382.

2 *Morawitz on Corp.*, Sections 870-873.
Cook on Stockholders (3rd Ed.), 303.
Hawthorn vs. Calef., 2 Wall., 10.
Carroll vs. Green, 92 U. S., 509.

Flash vs. Conn., 109 U. S., 371.
Richmond vs. Irons, 121 U. S., 27.
Bank vs. Hawkins, 174 U. S., 364.
Whitman vs. Bank, 176 U. S., 559.
Howell vs. Manglesdorf, 33 Kansas, 194.
Plumb vs. Bank, 48 Kansas, 484.
Achenbach vs. Coal Co., 2 Kansas App., 357.
Corning vs. McCollough, 1 N. Y., 47.
Wiles vs. Suydam, 64 N. Y., 73.
Conant vs. Van Schaick, 24 Barb., 87.
Norris vs. Wrenchell, 34 Md., 492.
Terry vs. Colman, 13 S. C., 220.

The defendant's liability was created by his contract of ownership of the stock, which was, in effect, an agreement on his part to pay an amount equal to the amount of his stock, toward the payment of the debts of the corporation, if it should become necessary.

As stated by Mr. Morawitz, in his work on corporations, the Statute does not make them liable. It is a mere legislative enactment permitting the persons to incorporate by assuming the liability. When a person becomes a stockholder he agrees to become liable to the creditors in this manner. It is contractual.

In *Howell vs. Manglesdorf*, the Supreme Court of Kansas asserts that "*this liability is in the nature of a guaranty,*" and being in the nature of a guaranty, it must be based on contract.

In *Plumb vs. Bank*, the Supreme Court of Kansas says "*the individual liability stands as a sort of surety for the corporate liability.*" It must therefore be based on contract.

In *Achenbach vs. Coal Co.*, the Kansas Court of Appeals says "the liability of a stockholder in an insolvent

corporation is in the nature of *a liability on contract*, and survives against the legal representatives of a deceased partner."

In *Hawthorn vs. Calef.*, 2 Wall., 10, it was held that the stockholders' liability was contractual, and this Court in discussing the question, says:

"It is quite clear that the personal liability clause in the charter in the present case, pledges the liability or guaranty of the shareholders, to the extent of their stock, to the creditors of the company, and to which pledge or guaranty the shareholders, by subscribing for stocks and becoming members of it, have assented. They thereby virtually agree to become security to the creditors for the payment of the debts of the company, which have been contracted upon the faith of this liability."

Carroll vs. Green, 92 U. S., 509, was an action in equity to enforce the liability of stockholders in a South Carolina bank. The defendant pleaded the Statute barring actions on contracts. The plaintiff contended that it was a liability created by Statute, to which this Court replied:

"The legislature created the corporation and prescribed certain terms to which the stockholders should be pledged. This was an offer on the part of the state. It could be accepted or declined. There was no constraint. By taking the stock the terms were acceded to, the contract became complete and the stockholders were bound accordingly. This same result which followed would have ensued under like circumstances between individuals. The assent thus given and the promise implied are the essence of the liability sought to be enforced in this proceeding. If a remedy at law was necessary, it must be on case."

In *Flash vs. Conn.*, 109 U. S., 371, a Statute of the State of New York, very similar to the Constitution of Kansas, was under consideration, and this Court in discussing the case, says:

"We think the liability imposed by Section 10 is a lia-

bility arising upon contract. The stockholders of the company are by that section made severally and individually liable, within certain limits, to the creditors of the company for its debts and contracts. Every one who becomes a member of the company by subscribing to its stock assumes this liability, which continues until the capital stock is all paid up and a certificate of that fact is made. published and recorded."

In *Richmond vs. Irons*, 121 U. S., 55, this Court, discussing the individual liability of a shareholder in a national bank, uses the following language:

"Under that act the individual liability of a stockholder is an essential element in the contract by which the stockholders became members of the corporation. It is voluntarily entered into by subscribing for and accepting shares of stock. Its obligation becomes a part of every contract, debt and engagement of the bank itself, as much so as if they were made directly by the stockholder instead of by the corporation. There is nothing in the Statute to indicate that the obligation arising under these undertakings and promises should not have the same force and effect, and be as binding in all respects, as any other contracts of the individual stockholder."

In *Bank vs. Hawkins*, 174 U. S., 372, this Court held that the liability of a stockholder in a national bank to respond to an assessment in case of insolvency. *is contractual.*

In case of *Whitman vs. Bank*, 176 U. S., 559, this Court, in discussing the liability of a stockholder in a Kansas corporation, under the laws in controversy in the case at bar. uses this language:

"It would not be doubted that if the stockholders in this corporation had formed a partnership, the obligations of each partner to the others and to creditors would be contractual, and determined by the general common law in respect to partnerships. If Kansas had provided for partnerships, with limited liability, and these parties, complying with the provisions of the Statute, had formed such a partnership, it would also be true that their obligations to

one another and to creditors would be contractual, although only in the Statute was to be found the authority for the creation of such obligations. And it is none the less so when these same stockholders organized a corporation under a law of Kansas, which prescribed the nature of the obligations which each thereby assumed to the other and to the creditors. While the Statute of Kansas permitted the forming of the corporation under certain conditions, the action of these parties was purely voluntary. In other words, they entered into a contract authorized by Statute."

In *Wiles vs. Suydam*, 64 N. Y., 173, it is expressly stated that an action to enforce a liability of the exact nature of that sought to be enforced in the case at bar, is an action on contract, and not one created by Statute.

The defendant in that case was a stockholder and also a trustee of a corporation formed under the general manufacturing act of 1848; and it was sought to hold him liable as a stockholder for a debt of the corporation contracted before the filing of a certificate stating the amount of the capital stock paid in, as required by Section 10 of said act, and liable as a trustee because of a report of the condition of the company not having been made, as required by Section 12. The defendant interposed a demurrer to the complaint, alleging a misjoinder of causes of action. The Court of Appeals held the demurrer well taken, and, in discussing the question (page 176), said that defendant's liability in the one instance was *"created by statute, and in the nature of a penalty imposed for neglect of duty in not filing a report showing the situation of the Company,"* while, in the other, he was *"primarily liable, as a stockholder, for the debts of the corporation, for the amount of his stock,"* and that the cause of action based thereon was *"an action on contract."*

Another case exactly in point, is *Terry vs. Colman*, 13

S. C., 220, which was an action against a stockholder in a bank, the charter of which provided that each stockholder should, upon the failure of the bank, be liable for its debts to an amount equal to twice the amount of his stock. The question involved was upon the Statute of Limitations, and its determination depended on whether the defendant's liability was *created by the Statute* incorporating the bank, or was *a simple contract debt;* and Chief Justice WILLARD, delivering the opinion of the Court, said:

"The debt of a stockholder under this contingent liability must be ranked as a simple contract debt, barred by lapse of four years from the cause of action accrued to the commencement of an action to enforce it. It is a mistake to call this liability of the stockholder a Statute liability. The whole object of the provision of the charter was to regulate the relations that should arise between the corporation and its stockholders. The subscription to the stock was a voluntary act that might be performed or declined. The liability that arose from such subscription, although defined by the charter, arose as the voluntary contract of the parties. This is precisely what the law does in fixing the rate of interest on and as affecting contracts demanding interest, but not fixing the rate, and interest computed under the authority of the Statute might as well be considered as representing a Statute liability as the cause of action in the present case."

Conant vs. Van Schaick, 24 Barb., 87, holds that a law repealing the stockholders' liability was inoperative, as it impaired the obligation of their contract. In the opinion, NELSON, Judge, says:

"Now, it is quite clear that the personal liability clause in the charter in the present case pledges the liability or guaranty of the stockholders to the creditors of the company, and to which pledging or guaranty the stockholders, by subscribing for stock and becoming members of it, have assented. They thereby virtually agree to become security to the creditors for the payment of the debts of the company which have been contracted upon the faith of this liability."

IV.

But even if we admit that the provisions of Section 394 apply to corporations of other states as well as those organized under the laws of New York, that the Western Farm Mortgage Trust Company was a monied corporation, within the meaning of that term, as used in said section, and that plaintiff's action is not based on contract, still said Section does not apply to this action, because the defendant's liability was created neither by the common law nor by any statute.

1. IF DEFENDANT'S LIABILITY WAS NOT CREATED BY HIS CONTRACT IN BECOMING A STOCKHOLDER IN THE CORPORATION, THEN IT WAS CREATED BY THE PROVISIONS OF THE CONSTITUTION OF THE STATE OF KANSAS.

This proposition is conclusively settled by the case of *Whitman vs. Bank*, 176 U. S., 559. Mr. Justice BREWER in delivering the opinion of this Court in that case, says:

"By Section 1 of Article XII of the Constitution of Kansas a certain definite liability is cast upon each stockholder in other than railway, religious and charitable corporations. This liability is for the dues of the corporation and to an amount equal to the stock owned by him. * * * The words, 'shall be secured,' are not merely directory to the legislature to make provision for such liability, but of themselves declare it. To this extent the Constitution is self-executing. * * * A failure of the legislature to create courts or prescribe modes of procedure may, it is true, make ineffective this constitutional provision, but does not destroy the liability; nor is it created by the act of the legislature prescribing the mode of its enforcement. This is the obvious meaning of the constitutional provision. 'The simplest and most obvious interpretation of a constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption'. LAMAR, Justice, in *Lake County vs. Rollins*, 130 U. S., 662, 671."

2. A LIABILITY CREATED BY A CONSTITUTIONAL PROVISION, DOES NOT COME WITHIN THE PROVISIONS OF SAID SECTION 394.

Clark vs. Water Commissioners, 148 N. Y., 1.

In delivering the opinion of the New York Court of Appeals in that case, Judge PECKHAM announces the law as follows:

"We are of the opinion that this proceeding comes under neither subdivision of the section above quoted. It is in no sense a proceeding to recover upon a liability created by Statute. The liability in this case is a liability to make compensation to the owner of lands and property taken by the water commissioners under the provisions of the Statutes above quoted. The liability to pay for property taken is not created by either statute. It is a constitutional liability instead of a mere statutory one. The Constitution prohibits the taking of private property for public use, without due compensation being made therefor. The legislature in giving to the City of Amsterdam, or its agents, in its behalf, the right to take property for public use, and in providing the proper proceeding to be followed in the taking of such property, was creating no statutory liability whatever. It was simply delegating the power to take the land and providing the procedure by which the land might be taken and the constitutional liability to make due compensation might be carried out and enforced. Such a liability, we think, does not come within the second subdivision of Section 382. The Statute does not itself create the liability, although the compensation was to be collected by means of the procedure provided for by it."

In fact, the language of said Section 394 of itself absolutely precludes the idea of it being intended to apply to a liability created by a constitutional provision, because a constitutional provision is neither "*the common law*" nor a "*statute.*"

We respectfully submit that the judgment of the Circuit Court of Appeals and of the Circuit Court should be reversed.

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